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Searching the Parameters of the Fourth Amendment Warrant Requirement--Reasonableness Gone Overboard: United States v. Villamonte-Marquez

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COMMENT

SEARCHING THE PARAMETERS OF THE FOURTH AMENDMENT WARRANT REQUIREMENT—REASONABLENESS GONE OVERBOARD: *UNITED STATES V. VILLAMONTE-MARQUEZ*

The fourth amendment to the United States Constitution prohibits unreasonable searches and seizures.¹ A search or seizure

¹ The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

In the early cases involving the fourth amendment, the Supreme Court applied a literal interpretation to the prohibition against unreasonable searches and seizures, defining the interest protected in terms of property law concepts. 1 W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 1.2, at 1-3 (2d ed. 1983); see, e.g., *Hester v. United States*, 265 U.S. 57, 59 (1924) (fourth amendment protection does not extend to open fields); *Gouled v. United States*, 255 U.S. 298, 305-06 (1921) (seizure of private papers unreasonable even without showing of force or coercion). This literal interpretation manifested itself in the doctrine of "protected zones," which approximated the borders of a person's property, within which the fourth amendment could be violated only if the intrusion were made by a government official. 1 W. RINGEL, *supra*, § 1.2, at 1-3. This concept led to such distinctions as that between curtilage, which was protected under the fourth amendment, and open fields, which were not protected. *Id.*; see *Hester*, 265 U.S. at 59. It was not until Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928), *overruled*, *Katz v. United States*, 389 U.S. 347, 352-53 (1967), that fourth amendment protection was defined in terms of a privacy, rather than a property, interest. 277 U.S. at 478 (Brandeis, J., dissenting); 1 W. RINGEL, *supra*, § 1.2, at 1-5. In *Olmstead*, the majority held that a person's telegraph or telephone messages did not come within the purview of the fourth amendment. 277 U.S. at 465. Dissenting, Justice Brandeis argued that "every unjustifiable intrusion by the Government upon the privacy of the individual, *whatever the means employed*, must be deemed a violation of the Fourth Amendment." *Id.* at 478 (Brandeis, J., dissenting) (emphasis added). The Court eventually adopted Justice Brandeis' analysis. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (fourth amendment applies to "stop and frisk" procedures on the street); *Katz v. United States*, 389 U.S. 347, 351 (1967) (fourth amendment protection extends to people rather than places).

Prior to the 1960's, the fourth amendment was, with rare exceptions, applied only to

made without a warrant is considered unreasonable unless it falls within certain limited exceptions.² Section 1581(a) of Title 19 of the United States Code authorizes customs officers to stop and board any vessel at any time and place in the United States or within customs waters without a warrant for the purpose of examining the vessel's documentation and conducting a search.³ In up-

criminal investigations. 1 W. RINGEL, *supra*, § 1.3, at 1-7. The Court has since applied the fourth amendment to many types of government activity. *See, e.g.*, *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967) (housing inspections). In addition, the fourth amendment has been held applicable to the states through the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

² *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Stoner v. California*, 376 U.S. 483, 486 (1964); *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Some of the exceptions to the warrant requirement are searches and seizures incident to lawful custodial arrests, *e.g.*, *United States v. Robinson*, 414 U.S. 218, 235 (1973), searches and seizures based on probable cause where exigent circumstances exist, *e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 51 (1970), searches and seizures by consent, *e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), administrative inspections, *e.g.*, *Donovan v. Dewey*, 452 U.S. 594, 598 (1981), emergency situations, *e.g.*, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), welfare visits, *e.g.*, *Wyman v. James*, 400 U.S. 309, 318 (1971), inventory searches of impounded vehicles, *e.g.*, *South Dakota v. Opperman*, 428 U.S. 364, 372-73 (1976), "stop and frisk" procedures, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 26-27 (1968), seizures of objects in "plain view," *e.g.*, *Harris v. United States*, 390 U.S. 234, 236 (1968), and border searches, *e.g.*, *United States v. Ramsey*, 431 U.S. 606, 621 (1977). For a discussion of the various exceptions to the warrant requirement, see 1 W. RINGEL, *supra* note 1, chs. 9-17.

At common law, evidence obtained through an illegal search or seizure was admissible. 1 J. VARON, *SEARCHES, SEIZURES AND IMMUNITIES* 39 (1961); 8 J. WIGMORE, *WIGMORE ON EVIDENCE* § 2183, at 5 (3d ed. 1940). The fourth amendment, while preserving "the right of the people to be free from unreasonable searches and seizures," does not expressly "provide any remedy for the violation of this right." 1 W. RINGEL, *supra* note 1, § 1.5, at 1-16. In order to fill this void, the Supreme Court adopted the exclusionary rule, which provides for the suppression of evidence obtained from an unreasonable search or seizure. *Weeks v. United States*, 232 U.S. 383, 398 (1914). The *Weeks* Court explained: "the duty of giving [the fourth amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Id.* at 392. The Supreme Court also has made the rule applicable to state prosecutions under the fourteenth amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule applies to all evidence directly obtained in an illegal search or seizure and to any derivative evidence obtained from information revealed by the "unreasonable" search or seizure. 1 W. RINGEL, *supra* note 1, § 3.2, at 3-3; *see, e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

³ 19 U.S.C. § 1581(a) (1982). Section 1581(a) provides:

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

holding boardings made pursuant to section 1581(a), federal courts have relied on recognized exceptions to the warrant rule rather than on the apparently unqualified authority granted by the statute.⁴ Recently, however, in *United States v. Villamonte-Marquez*,⁵

Id. (citation omitted). Since Coast Guard officers are considered customs officers, see § 1401(i), they possess the same authority under section 1581(a), in addition to their independent statutory authority to board vessels, 14 U.S.C. § 89(a) (1982). Section 89(a) of title 14 provides that the Coast Guard may:

go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

Id.

The stopping and boarding of a vessel by law enforcement authorities constitutes a "seizure" within the meaning of the fourth amendment. See *United States v. Whitmore*, 536 F. Supp. 1284, 1291 (D. Me. 1982), *aff'd sub nom. United States v. Dillon*, 701 F.2d 6 (1st Cir. 1983); cf. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (stop of vehicle considered a seizure within meaning of the fourth amendment); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (police officer stopping and detaining an individual constitutes a seizure). The boarding can also constitute a search. See 1 W. RINGEL, *supra* note 1, § 2.2, at 2-4 (Supreme Court has broadly defined "search" to include any intrusion of an area in which there is a reasonable expectation of privacy).

⁴ Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAAMI L. REV. 51, 93 (1977). Most courts that have upheld the constitutionality of a boarding pursuant to section 1581(a) have inferred a statutory requirement that customs officers have a reasonable suspicion of criminal activity aboard the vessel. See *Blair v. United States*, 665 F.2d 500, 505 (4th Cir. 1981); *United States v. Streifel*, 665 F.2d 414, 422 (2d Cir. 1981). Thus, where a combination of circumstances has given customs officers "reasonable and articulable grounds" for suspecting a smuggling operation, courts have sustained the search and seizure of the vessel. See, e.g., *United States v. Green*, 671 F.2d 46, 53-54 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *Blair*, 665 F.2d at 505; *Streifel*, 665 F.2d at 423; accord *United States v. Glen-Archila*, 677 F.2d 809, 813 (11th Cir. 1982) (sustaining constitutionality of a boarding pursuant to 14 U.S.C. § 89(a)), *cert. denied*, 103 S. Ct. 165 (1983). Grounds that have been deemed adequate for the stopping and boarding of boats by customs officials include a low-floating boat previously listed as a suspected smuggling vessel, *Green*, 671 F.2d at 53-54, and use of a shrimping vessel out of season, *United States v. D'Antignac*, 628 F.2d 428, 434 (5th Cir. 1980), *cert. denied*, 450 U.S. 967 (1981). Courts have equated boardings pursuant to section 1581(a) with brief investigatory stops on land that can be made only when law enforcement officers reasonably believe that criminal activity may be present. See *Streifel*, 665 F.2d at 423.

The Ninth Circuit has upheld boardings pursuant to section 1581(a) based on the border search exception to the warrant requirement. See, e.g., *United States v. Stanley*, 545 F.2d 661, 667 (9th Cir. 1976), *cert. denied*, 436 U.S. 917 (1978); *United States v. Tilton*, 534 F.2d 1363, 1366 (9th Cir. 1976); *United States v. Solmes*, 527 F.2d 1370, 1372 (9th Cir. 1975); see also Comment, *The Fourth Amendment Afloat: Customs Searches, Drug Smuggling and the Balancing Test in the Fifth Circuit*, 68 GEO. L.J. 1035, 1042-43 (1980). Border searches without cause are considered reasonable in recognition of the important interest the sovereign has in policing its boundaries. *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977); *Carroll v. United States*, 267 U.S. 132, 154 (1925). To fall within this exception, the search may occur at the border itself or at its "functional equivalents." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). The Ninth Circuit has held that boardings that

the Supreme Court, in the absence of alternative grounds and relying solely on the blanket authority delegated to customs officers by the statute, held that a boarding made without a warrant pursuant to section 1581(a) did not violate the fourth amendment.⁶

In *Villamonte-Marquez*, customs officers were patrolling the Calcasieu River Ship Channel when they observed the *Henry Morgan II*, the defendants' 40-foot sailboat, which was anchored approximately 18 miles inland from the Gulf of Mexico.⁷ When one of the defendants merely shrugged his shoulders in response to a question from a customs officer, the officer and a state policeman went aboard the vessel to investigate its documentation.⁸ While on board, the customs officer noticed the smell of marijuana and observed burlap-wrapped bales of the drug through an open hatch.⁹ The defendants immediately were arrested.¹⁰

At trial, the defendants' motion to suppress evidence obtained by the search was denied,¹¹ and they were found guilty of violating federal drug laws.¹² The Court of Appeals for the Fifth Circuit reversed, holding that the officers' initial boarding of the boat was unreasonable under the fourth amendment.¹³ The Supreme Court

occur in waterways near the border qualify as searches at functional equivalents of the border. *E.g.*, *Tilton*, 534 F.2d at 1366.

⁶ 103 S. Ct. 2573 (1983).

⁷ *Id.* at 2582.

⁸ *Id.* at 2576-77. The Calcasieu River Ship Channel connects Lake Charles, Louisiana, a designated Customs Point of Entry, with the Gulf of Mexico. *Id.* at 2576. All vessels traveling between Lake Charles and the Gulf of Mexico must use this channel. *Id.*

⁹ *Id.* at 2576-77. The customs officers had noticed a large freighter which created a heavy wake as it passed the *Henry Morgan II*, and caused the sailboat to be tossed from side to side. *Id.* at 2576. The officers then inquired into the welfare of the crew of the sailboat. *Id.* at 2576-77. Ostensibly, because one of the respondents merely shrugged his shoulders in response, the officers boarded the vessel. *Id.* at 2577.

Once on board the vessel, a customs officer discovered that the home port designation of "Basilea" displayed on the stern was Latin for Basel, Switzerland. *Id.* Upon examination, it was discovered that the vessel was of French registry. *Id.*

¹⁰ *Id.* at 2577.

¹¹ *Id.*

¹² See *United States v. Villamonte-Marquez*, 652 F.2d 481, 484 (5th Cir. 1981), *rev'd*, 103 S. Ct. 2573 (1983). The search of the *Henry Morgan II* revealed approximately 5,800 pounds of marijuana. 103 S. Ct. at 2577.

¹³ 103 S. Ct. at 2577. The respondents were found guilty of possession of a controlled substance with intent to distribute, see 21 U.S.C. § 841(a)(1) (1982), conspiracy to possess a controlled substance with intent to distribute, see *id.* § 846, importation of a controlled substance, see *id.* § 952(a), and conspiracy to import a controlled substance, see *id.* § 963. 103 S. Ct. at 2577.

¹⁴ *Villamonte-Marquez*, 652 F.2d at 488. The Fifth Circuit declined to uphold the boarding as a valid border search because the officers, at the time of the boarding, had no

granted certiorari,¹⁴ and reversed the Fifth Circuit decision, holding that the boarding pursuant to section 1581(a) was reasonable within the meaning of the fourth amendment.¹⁵

Justice Rehnquist, writing for the majority,¹⁶ noted that in 1790 the First Congress enacted a comprehensive statute¹⁷ to provide for the collection of duties on imported goods.¹⁸ Section 31 of this statute appeared to be the original version of section 1581(a).¹⁹ Since the Congress that enacted section 31 had proposed the Bill of Rights, the majority reasoned that the members of that Congress must have endorsed searches and seizures authorized by the original statute as reasonable within the meaning of the fourth amendment.²⁰ The Court thus concluded that section 1581(a) had an "impressive historical pedigree."²¹

After reviewing the Court's recent decisions concerning automobile stops, Justice Rehnquist acknowledged that random automobile stops without suspicion on public highways violate the fourth amendment.²² The majority, however, asserted that similar

reason to believe that the *Henry Morgan II* had crossed the border. *Id.* at 486. The court also found that a "reasonable suspicion of a law violation" could not have been inferred from the surrounding circumstances. *Id.* at 487-88.

¹⁴ 457 U.S. 1104 (1982).

¹⁵ 103 S. Ct. at 2582.

¹⁶ Chief Justice Burger and Justices White, Powell, Blackmun, and O'Connor joined in the majority opinion.

¹⁷ Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (current version at 19 U.S.C. §§ 1202-1677(g) (1982)).

¹⁸ 103 S. Ct. at 2577. The purpose of the statute was "to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels." Act of Aug. 4, 1790, ch. 35, 1 Stat. 145, 145 (emphasis omitted).

¹⁹ 103 S. Ct. at 2577. Section 31 of the original Act provided, in part:

That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters herein after [sic] mentioned, to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels

Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164 (current version at 19 U.S.C. § 1581(a) (1982)).

²⁰ 103 S. Ct. at 2578-79 (citing *Boyd v. United States*, 116 U.S. 616, 623 (1886)).

²¹ 103 S. Ct. at 2578.

²² *Id.* at 2579. Justice Rehnquist's discussion included an analysis of three Supreme Court cases: *Delaware v. Prouse*, 440 U.S. 648 (1979), in which random spot checks of automobiles were held unreasonable in the absence of an articulable and reasonable suspicion of unlawful conduct, *id.* at 663; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), in which stops of automobiles in the absence of any suspicion of wrongdoing were held permissible only at reasonably located fixed checkpoints, *id.* at 562; and *United States v.*

random investigations of vessels are consistent with the fourth amendment because of the factual distinctions between a vessel in a waterway with access to the sea and an automobile on a public highway near the border.²³ Finally, the Court argued that the pervasiveness and complexity of documentation requirements for vessels indicate that the interest of the Government in assuring compliance with these requirements outweighs the intrusion on fourth amendment rights involved in boardings pursuant to section 1581(a).²⁴ Thus, Justice Rehnquist concluded that the stopping and boarding of the *Henry Morgan II* did not violate the fourth amendment.²⁵

In a vehement dissent,²⁶ Justice Brennan contended that the case was moot because the indictment against the respondents had been dismissed before the petition for certiorari was filed.²⁷ Ad-

Brignoni-Ponce, 422 U.S. 873 (1975), in which it was decided that officers may not make random stops of automobiles near the border unless they reasonably believe that the vehicles contain illegal aliens, *id.* at 883.

²³ 103 S. Ct. at 2579-80. The majority asserted that fixed checkpoint stops of vessels are not practical because vessels, unlike automobiles, need not follow established thoroughfares. *Id.* at 2580. The Court observed that while fixed checkpoints may prove feasible for commerce on inland waters that must eventually funnel into relatively narrow straits or canals, such procedures are less feasible with waterways providing ready access to the open sea. *Id.* Justice Rehnquist also rejected the respondents' contention that fixed checkpoints could be established at various ports, reasoning that vessels on or near the open sea could conduct their operations without ever coming into harbor. *Id.*

²⁴ *Id.* at 2580-82. The Court noted that the statutes and regulations governing the documentation of vessels were more complex than state provisions for motor vehicle registration, *id.* at 2580, and held that in contrast to the strong government interest in assuring compliance with documentation requirements, the corresponding intrusion on fourth amendment rights was limited, *id.* at 2581-82.

²⁵ *Id.* at 2582. The officers' conduct once aboard the sailboat was not at issue. *Id.* at 2577 n.3. If the initial boarding without suspicion was valid, the officers could seize any evidence in "plain view" without a warrant, and this evidence could not be suppressed. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971); *Harris v. United States*, 390 U.S. 234, 236 (1968) (per curiam). Thus, the sole issue presented was the constitutionality of the initial boarding to conduct the document check pursuant to section 1581(a). 103 S.Ct. at 2577 n.3.

²⁶ Justice Marshall joined in Justice Brennan's dissent. Justice Stevens joined in Part I of the dissent regarding the issue of mootness.

²⁷ 103 S. Ct. at 2582-84 (Brennan, J., dissenting). The mandate of the court of appeals was issued on October 29, 1981. *Id.* at 2583 (Brennan, J., dissenting). The Fifth Circuit granted the Government's motion to recall the mandate and stay its reissuance until December 7. *Id.* (Brennan, J., dissenting). When the stay expired, the mandate was reissued on December 8. *Id.* (Brennan, J., dissenting). The Government moved for dismissal of the indictment and this motion was granted on December 21. *Id.* (Brennan, J., dissenting). On January 18, 1982, the Government's petition for certiorari was filed. *Id.* (Brennan, J., dissenting).

The majority dismissed the respondents' contention that the case was moot, finding

addressing the merits of the case, the dissent attacked as without precedent the majority's grant of unlimited discretion to customs officers.²⁸ Justice Brennan contended that the standards established by the Court's "vehicle-stop" cases require that any stop or search be supported by some objective limitation on the discretion of the law enforcement authorities.²⁹ Moreover, the dissent continued, the intrusion in *Villamonte-Marquez* was more severe than those commonly associated with vehicle stops.³⁰ Disputing the majority's contention that the maritime setting posed special problems that made fixed checkpoints impractical, Justice Brennan contended that the nature of the waterway in the instant case was conducive to the effective employment of such measures.³¹ Regardless of the feasibility of maintaining fixed checkpoints, the dissent concluded, a requirement of reasonable suspicion for stops would allow the Government sufficient leeway for effective law enforcement.³²

In *Villamonte-Marquez*, the Supreme Court has permitted customs officers virtually unlimited discretion to board vessels pursuant to section 1581(a). By rejecting any objective limitation on the officers' discretion to initiate a boarding, the Court has ne-

that the Court's reversal of the Fifth Circuit's decision normally would reinstate the conviction and the sentence entered by the district court. *Id.* at 2575-76 n.2; see *United States v. Wilson*, 420 U.S. 332, 352-53 (1975). The Court held that the issuance of the mandate was irrelevant to the issue of mootness. 103 S. Ct. at 2576 n.2; see *Carr v. Zaja*, 283 U.S. 52, 53 (1931). Since the preliminary steps in a criminal proceeding are merged into the sentence, the majority concluded that a separate reinstatement of the original indictment was unnecessary. 103 S. Ct. at 2576 n.2.

²⁸ 103 S. Ct. at 2585 (Brennan, J., dissenting). The dissent noted that only the border search exception has approximated the broad grant of discretion approved by the Court. *Id.* at 2585 n.6 (Brennan, J., dissenting); see *supra* note 4.

²⁹ 103 S. Ct. at 2588 (Brennan, J., dissenting); see *infra* note 56 and accompanying text.

³⁰ 103 S. Ct. at 2588 (Brennan, J., dissenting). Justice Brennan noted that the intrusion in the instant case involved the actual boarding of a private vessel, rather than a mere stopping and questioning of the occupants as in the "vehicle-stop" cases. *Id.* (Brennan, J., dissenting). The dissent reasoned that since a boat often serves as a residence, its owners and occupants reasonably could have a greater expectation of privacy than the driver and passengers of an automobile. *Id.* at 2588-89 (Brennan, J., dissenting).

³¹ *Id.* at 2589 (Brennan, J., dissenting). The dissent observed that the ship channel was similar to the type of limited-access highways where fixed checkpoints have been set up by the Border Patrol. *Id.* (Brennan, J., dissenting). Justice Brennan implied that it would not be difficult to establish a fixed checkpoint on the channel. See *id.* at 2589 & n.10 (Brennan, J., dissenting).

³² *Id.* at 2590 (Brennan, J., dissenting). The dissent contended that "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators." *Id.* (Brennan, J., dissenting) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975)).

glected the traditional scrutiny given to alleged intrusions on fourth amendment rights. This Comment will examine the Supreme Court's rationale for upholding the constitutionality of the boarding of the *Henry Morgan II*, identify the weaknesses in the Court's reasoning, and consider some of the unforeseen practical implications of the Court's holding.

Historical Pedigree

The Court's "historical pedigree" argument supported a broad interpretation of section 1581(a) by reference to the statute's ancestor, section 31 of the Revenue Service Cutter Act (section 31).³³ The original section 31, however, authorized a boarding to examine the manifests of a vessel,³⁴ whereas section 1581(a) authorizes a boarding to inspect the manifest *and other documents*.³⁵ At the time of the original statute's enactment, a manifest only was required for vessels carrying merchandise from foreign countries into the United States.³⁶ The purpose of the manifest was to facilitate the collection of duties by customs officers and to enable the Government to receive an account of the ship's cargo without a search.³⁷ During this period, the overwhelming majority of non-military ships were merchant vessels which transported goods.³⁸

³³ See Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164 (current version at 19 U.S.C. § 1581(a) (1982)).

³⁴ See *id.*

³⁵ See 19 U.S.C. § 1581(a) (1982). The original version of the statute, section 31 of the Revenue Service Cutter Act, Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164, was reenacted several times with no significant changes. See Tariff Act of 1930, ch. 497, § 581, 46 Stat. 590, 747; Tariff Act of 1922, ch. 356, § 581, 42 Stat. 858, 979; Act of March 2, 1799, ch. 22, § 54, 1 Stat. 627, 668. Section 581 of the Tariff Act was amended in 1935 to include the current language that authorizes customs officers to "examine the manifest and *other documents and papers*" of the vessel. Act of Aug. 5, 1935, ch. 438, § 203, 49 Stat. 517, 521-22 (1935) (codified at 19 U.S.C. § 1581(a) (1982)) (emphasis added).

³⁶ See Act of Aug. 4, 1790, ch. 35, § 9, 1 Stat. 145, 155. Section 9 provided that: [N]o goods, wares or merchandise shall be brought into the United States from any foreign port or place, in any ship or vessel belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, unless the master or person having the charge or command of such ship or vessel shall have on board a manifest or manifests in writing

Id.

³⁷ A manifest is a written document summarizing all the bills of lading on the ship. Carmichael, *supra* note 4, at 54 n.9. The master of a vessel arriving from a foreign port must deliver a copy of the manifest to the designated employee of the Department of the Treasury. See 19 U.S.C. § 1439 (1982).

³⁸ Recent Case, *The Fourth Amendment Adrift: Search and Seizure on the High Seas*, 26 Loy. L. Rev. 1017, 1026 (1980).

Today, recreational vessels are the predominant type of boat on the water.³⁹ When the Legislature enacted section 31, it could not have envisioned the nature and extent of recreational boating as it is engaged in today; nor would the random search of pleasure crafts have been consistent with the commercial orientation of the statute. Therefore, the historical pedigree of section 1581(a) should extend, at most, only to commercial vessels.⁴⁰

Balancing of Interests

After establishing that the delegation of power under section 1581(a) was constitutionally acceptable, the Court turned to the reasonableness of the boarding of the *Henry Morgan II*.⁴¹ In determining whether a particular search or seizure is reasonable within the meaning of the fourth amendment, courts traditionally have balanced the government interest furthered by the search or seizure against the degree of intrusion upon the constitutionally protected rights of the individual.⁴² In balancing these interests,

³⁹ In 1981, there were 12.5 million recreational boats in the United States. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 235 (1982).

⁴⁰ See *Fish v. Brophy*, 52 F.2d 198, 201 (S.D.N.Y. 1931). *Fish* involved the boarding of the plaintiff's pleasure boat in New York Bay, and a subsequent warrantless search of the vessel. *Id.* at 198. The court held that section 581 of the Tariff Act of 1922, ch. 356, § 581, 42 Stat. 979 (current version at 19 U.S.C. § 1581(a) (1982)), did not apply to pleasure boats. 52 F.2d at 201. The district court reasoned that manifests were required only in the case of vessels carrying cargo from foreign ports. *Id.* at 200. In addition, the court believed that the Legislature could not have intended to place pleasure boats in the same category as commercial vessels. *Id.* at 201. Two years later, in *Olsen v. United States*, 68 F.2d 8 (2d Cir. 1933), the Second Circuit held that the statute applied to pleasure boats as well as to commercial vessels. *Id.* at 9. Although the court acknowledged that pleasure boats were treated as a distinct class under federal law, it held that federal regulation of such vessels mandated that they be subject to examination under section 581. *Id.* at 10. It should be noted, however, that the court's holding did not address the intent of Congress in enacting the statute.

⁴¹ See 103 S. Ct. at 2582; *supra* notes 22-25 and accompanying text.

⁴² See, e.g., *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring); *South Dakota v. Opperman*, 428 U.S. 364, 379 (1976) (Powell, J., concurring); *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967); Recent Case, *supra* note 38, at 1024. In *Opperman*, the defendant's automobile was towed for violation of a local parking ordinance and was impounded in a city lot. 428 U.S. at 365-66. A subsequent inventory search revealed a quantity of marijuana. *Id.* at 366. Based on this evidence the defendant was convicted of possession of marijuana. *Id.* The Supreme Court of South Dakota reversed the conviction, holding that the search violated the fourth amendment. *Id.* at 366-67. The United States Supreme Court reversed. *Id.* at 367. Concurring, Justice Powell noted that routine inventory searches served three public interests: "the protection of the police from danger," the protection of the police from claims of lost or stolen property, and the safeguarding of the personal property left in the

two relevant factors are the availability of less intrusive alternatives that would foster the identical government interest and the ratio of innocent to guilty people affected by the Government's action.⁴³

While the Government has a strong interest in enforcing customs and vessel documentation laws, there are plausible methods of enforcement which do not involve the random boarding of a vessel. Fixed checkpoints, for example, have proven successful, even on the open sea;⁴⁴ nevertheless, the *Villamonte-Marquez* Court

automobile by the owner. *Id.* at 378 (Powell, J., concurring). Justice Powell found that these interests outweighed the interest of citizens in the privacy of the contents in their automobiles. *Id.* at 379-80 (Powell, J., concurring).

United States v. Brignoni-Ponce involved the random stopping of an automobile by a roving patrol and the questioning of its occupants. 422 U.S. at 874-75. The purpose of such stops was to prevent the immigration of illegal aliens into the United States. *Id.* at 879. Against this public interest, the Court balanced the interference with individual liberty that results from random stops. *Id.* The majority held that the public interest did not justify subjecting all drivers of automobiles to random stops. *See id.* at 882.

In *Camara v. Municipal Court*, the Supreme Court addressed the constitutionality of a warrantless housing inspection. *See* 387 U.S. at 527. The Court held that the sole test for determining the reasonableness of the search was to balance "the need to search against the invasion which the search entails." *Id.* at 536-37. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1(e), at 236 (1978).

⁴³ Comment, *supra* note 4, at 1046-47. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Supreme Court ruled that the random stopping of an automobile and the detention of the driver to check his driver's license and registration violates the fourth amendment. *Id.* at 663. In reaching this conclusion, the Court recognized that less intrusive alternatives, such as acting upon observed violations of law or roadblock stops of all traffic, would be as effective as random stops in detecting unlicensed drivers and unregistered vehicles. *Id.* at 659, 663. The Court also considered the large number of licensed drivers that would be stopped to find one unlicensed operator. *Id.* at 659-60. Similarly, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court recognized that random roving patrol stops of automobiles would interfere with a large volume of legitimate traffic, *id.* at 882, and held such stops to be unreasonable under the fourth amendment, *id.* at 883.

⁴⁴ *See, e.g., United States v. Harper*, 617 F.2d 35, 38 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980). In *Harper*, the court upheld a boarding pursuant to 14 U.S.C. § 89(a) (1982), that was conducted at a fixed checkpoint in a well-traveled Caribbean sealane. 617 F.2d at 37, 39. All vessels of a size sufficient for large smuggling operations were boarded. *Id.* at 38. The court held that the checkpoint stops and boardings were similar to the roadside checkpoints that the Supreme Court had found reasonable. *Id.* at 39; *see United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976). Fixed checkpoints also were used in "Operation Stop-gap," a program conducted by the United States Coast Guard to curtail drug smuggling operations. Coast Guard cutters patrolled the Windward, Leeward, Mona, and Yucatan passages of the Caribbean, systematically boarding all vessels of a certain size. *See Stopping "Mother Ships"—A Loophole in Drug Enforcement: Hearings on S. 3437 Before The Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. of the Judiciary*, 95th Cong., 2d Sess. 15 (1978) (statement of Captain Robert H. Overton, III, Chief of Ocean Operations, U.S. Coast Guard) [hereinafter cited as *Drug Enforcement*]; Collier, *New U.S. War to Collar Drug Smugglers and Their Untaxed Billions*, Sunday Cape Cod Times, Sept.

discounted this alternative as impractical in a maritime or inland water setting.⁴⁵ The Court did not mention other, less intrusive alternatives, such as checking documentation by radio or by hailing.⁴⁶ Nor did Justice Rehnquist consider the large number of innocent pleasure boat owners who would be subject to indiscriminate boardings pursuant to section 1581(a).⁴⁷ Instead, the Court's holding was justified by the assertion that the boarding presented only a limited intrusion.⁴⁸ It is submitted, however, that this rather selective application of the balancing test is flawed in its failure to consider these relevant factors.

By distinguishing between automobiles and vessels, the Court has made the physical area intruded upon by the Government the determinative factor in a fourth amendment balancing test.⁴⁹ This distinction derives from the literal application of the fourth amendment employed by the Court in the early half of this century.⁵⁰ In the late 1960's, however, the Supreme Court shifted the emphasis away from physical characteristics to focus instead on the reasonable expectation of privacy of the individuals subject to

17, 1978 (Parade Magazine), at 4. This operation was considered quite successful in confiscating contraband. *See Drug Enforcement, supra*, at 6 (statement of Sen. John Chafee).

⁴⁵ Despite the majority's aversion to fixed checkpoints on waterways, *see* 103 S. Ct. at 2580, the nature of the Calcasieu River Ship Channel, as the dissent indicated, made fixed checkpoints a plausible alternative to random stoppings and boardings, *see id.* at 2589 (Brennan, J., dissenting).

⁴⁶ *See, e.g., United States v. Green*, 671 F.2d 46, 48-49 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Arra*, 630 F.2d 836, 838 (1st Cir. 1980). *See generally Note, High on the Seas: Drug Smuggling, The Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725, 737-38 (1980). The Coast Guard is required to publish a list of all documented vessels together with any pertinent information about the vessels. 46 U.S.C. § 65s (Supp. V 1981). It has been suggested that ship-to-shore communication can be used to relay this information to officers patrolling the waters. *See Villamonte-Marquez*, 103 S. Ct. at 2590 (Brennan, J., dissenting). In addition, if the master of the vessel has a manifest, customs officers may request the master to come aboard their ship so that the manifest may be inspected. *Id.* (Brennan, J., dissenting). Finally, customs officers could forego boarding until they observed or reasonably suspected unlawful activity. *See supra* note 32 and accompanying text; *cf. United States v. Brignoni-Ponce*, 422 U.S. at 883 ("characteristics of smuggling operations tend to generate articulable grounds for identifying violators").

⁴⁷ *See* 103 S. Ct. at 2581-82; *see also supra* note 40 and accompanying text (historical pedigree of statute extends only to commercial vessels).

⁴⁸ 103 S. Ct. at 2582. The Court acknowledged that the interference caused by the boarding was a "modest intrusion." *Id.* at 2581-82. Nevertheless, the Court stated that the intrusion was outweighed by the Government's interest in assuring compliance with the documentation laws and the need to deter smugglers. *Id.* at 2582.

⁴⁹ *See id.* at 2579-80.

⁵⁰ *See supra* note 1.

the particular search or seizure.⁵¹ It is suggested that by rigidly distinguishing between automobiles and vessels, the *Villamonte-Marquez* Court neglected to accord due weight to the reasonable expectation of privacy possessed by operators and passengers of vessels.⁵²

As the dissent observed, a vessel commonly serves as a dwelling for its occupants.⁵³ Therefore, if a distinction is to be made between automobiles and vessels, it should be recognized that the occupants of a vessel have a greater expectation of privacy than those of an automobile.⁵⁴ Although this expectation of privacy

⁵¹ *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the defendant sought to suppress tapes of phone conversations that he had made from a public phone booth. *Id.* at 348. The Government contended that since there was no actual physical penetration of the phone booth, the case should escape fourth amendment analysis. *Id.* at 352. The Court held that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures [and] it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353. Cases that exemplify the trend that the Court has followed since *Katz* include *Brown v. Texas*, 443 U.S. 47, 51 (1979), and *Delaware v. Prouse*, 440 U.S. 648, 662 (1979). In *Brown*, the appellant was stopped and questioned by police officers in an alley because he looked suspicious. 443 U.S. at 48-49. The Court held that this stop and detention constituted a seizure of appellant's person. *Id.* at 50. The Court used a balancing test to determine the constitutionality of the seizure, *id.* at 50-51, and recognized that the central concern of the test was the protection of an individual's reasonable expectation of privacy from arbitrary Government intrusion, *id.* at 51. In *Brown*, the balance fell in favor of the individual's right to personal privacy. *Id.* at 52. Similarly, in concluding that random automobile stops by the police violated the fourth amendment, the *Prouse* Court declared that an individual "does not lose all reasonable expectation of privacy" when he enters an automobile. 440 U.S. at 662-63.

The Court, however, has applied *Katz* in a limited manner. See LaFave, *Supreme Court Report*, 69 A.B.A. J. 1740, 1740 (1983). For example, in *Smith v. Maryland*, 442 U.S. 735 (1979), the Court held that the use of a pen register, a device that records the numbers dialed from an individual's phone, was not a search within the meaning of the fourth amendment. *Id.* at 745-46. The majority reasoned that the petitioner could have no expectation of privacy since he had voluntarily transmitted the number he dialed to the phone company. *Id.* at 744-45; see also *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (Court has not abandoned concepts of property law in determining existence of privacy interest protected by fourth amendment).

⁵² Cf. *United States v. Streifel*, 665 F.2d 414, 423 (2d Cir. 1981) (need to stop vessels not significantly different from need to stop vehicles).

⁵³ 103 S. Ct. at 2588 (Brennan, J., dissenting).

⁵⁴ Note, *supra* note 46, at 728. In *United States v. Cadena*, 588 F.2d 100 (5th Cir. 1979), the Fifth Circuit, while declining to treat searches of vessels differently from searches of automobiles, stated that there was a greater expectation of privacy aboard a vessel than in a van or curtained limousine. *Id.* at 101. The Ninth Circuit, in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979), though not expressly recognizing that a greater expectation of privacy exists aboard a vessel, held that random stops of pleasure boats after dark were not constitutionally permissible. *Id.* at 361. The court based its holding on the availability of a less intrusive means of enforcing vessel safety regulations. *Id.* It may be argued that the

must be balanced against the Federal Government's interest in enforcing the smuggling and vessel documentation laws, it is suggested that the Government's interest in recreational vessels is less compelling than its interest in commercial vessels.⁵⁵ It is further suggested that the correct balancing of interests mandates that the standards employed for the stopping and boarding of pleasure vessels at least be set at the level of those governing automobile stops.⁵⁶

Piner majority implicitly recognized that stopping and boarding a recreational vessel at night involves a greater intrusion on an individual's privacy interest than the random stop of an automobile. *Cf. Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion) (lesser expectation of privacy in vehicle because it seldom serves as a residence).

It should be noted that the Ninth Circuit, in *United States v. Williams*, 630 F.2d 1322 (9th Cir.), *cert. denied sub nom.* 449 U.S. 865 (1980), held that an individual's reasonable expectation of privacy in a motor home is significantly greater than in an automobile. *Id.* at 1326; *accord* *People v. Carney*, 34 Cal. 3d 597, 603, 668 P.2d 807, 812, 194 Cal. Rptr. 500, 505 (1983), *cert. granted*, 52 U.S.L.W. 3687 (Mar. 19, 1984). In *Carney*, the California Supreme Court acknowledged that a motor home only serves as a temporary residence, but concluded that the temporary nature of the living quarters did not diminish the occupant's reasonable expectation of privacy. *Id.* at 604, 668 P.2d at 813, 194 Cal. Rptr. at 506. In support of this conclusion, the court noted that personal effects were more likely to be found in a motor home than in an automobile and that whereas the interior of an automobile usually was exposed to the public, the interior of a motor home commonly was shielded from public view. *Id.*

⁵⁵ See *United States v. Williams*, 544 F.2d 807, 811 (5th Cir. 1977). *Williams* involved the boarding of a houseboat by customs agents pursuant to section 1581(a). *Id.* at 808. The court held that customs enforcement applied only to vessels which normally carried cargo or persons subject to the customs laws. *Id.* at 811. Indeed, the customs laws maintain a distinction between recreational and commercial vessels. For example, American vessels arriving from a foreign port or place and all foreign vessels are required to make entry at the appropriate customhouse. See 19 U.S.C. §§ 1434-1435 (1982). However, "[l]icensed yachts or undocumented American pleasure vessels not engaged in trade nor in any way violating the customs or navigation laws of the United States" are not required to make entry at the customhouse. *Id.* § 1441(3). Nevertheless, though not required to make entry at the customhouse, pleasure boats now are subject to random boardings by customs officers. See 103 S. Ct. at 2582. With respect to the Federal Government's interest in assuring compliance with the federal documentation laws, it should be noted that the federal documentation law for pleasure vessels is optional. See 46 U.S.C. § 651 (Supp. V 1981).

⁵⁶ The first of the important cases that formulated the fourth amendment standards for automobile stops was *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In *Almeida-Sanchez*, the Supreme Court held that a full search of an automobile by a roving patrol on an east-west highway 20 miles north of the Mexican border did not fall within the border search exception and was, therefore, impermissible absent probable cause or consent. *Id.* at 273. Two years later, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court held that random stops of vehicles near the border violated the fourth amendment unless the officers had a reasonable suspicion of unlawful activity. *Id.* at 882. The Court noted that a tremendous amount of legitimate traffic would be impeded if officers were allowed the discretion to stop any vehicle at random. *Id.* In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Supreme Court upheld the constitutionality of checkpoint stops of

Circumvention of the Warrant Requirement

Although the majority asserted that *Villamonte-Marquez* presented an opportunity to resolve a conflict between the circuits,⁵⁷ it is suggested that the Court erred in perceiving such a conflict. The circuit courts have upheld warrantless boardings that fell within two categories: (1) a border search at the functional equivalent of the border if the officers are reasonably certain that the vessel crossed the border;⁵⁸ (2) an investigatory stop if the customs officers have a reasonable suspicion that there is unlawful activity aboard the vessel.⁵⁹ These criteria are not mutually exclusive and the Court could have adopted both, thus affording the necessary protection to fourth amendment rights.⁶⁰ Instead, the Court held that the exercise of unlimited authority pursuant to the plain language of the statute was acceptable under the fourth amendment.⁶¹ In creating an exception to the warrant requirement that

automobiles, holding that such stops may be made even in the absence of a reasonable suspicion of unlawful activity. *Id.* at 566. The *Martinez-Fuerte* Court observed that the reasonable suspicion requirement for stops on major inland roads would be impractical when there is a heavy flow of traffic. *Id.* at 557. Checkpoint stops were deemed reasonable because innocent motorists would not be taken by surprise as in random stops and, unlike random stops, checkpoint stops imposed some limits on the law officers' discretion. *Id.* at 559. Finally, in *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held that the random stopping of an automobile to check a motorist's driver's license and the vehicle's registration was unreasonable within the meaning of the fourth amendment in the absence of a reasonable suspicion of a violation of the law. *Id.* at 663.

⁵⁷ See 103 S. Ct. at 2577. While the Ninth Circuit has upheld boardings pursuant to section 1581(a) under the border search exception to the warrant requirement, see, e.g., *United States v. Tilton*, 534 F.2d 1363, 1366 (9th Cir. 1976), the other circuits generally have analogized these boardings to investigatory stops requiring a reasonable suspicion of unlawful activity, see, e.g., *United States v. Green*, 671 F.2d 46, 53-54 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Streifel*, 665 F.2d 414, 422 (2d Cir. 1981); *United States v. D'Antignac*, 628 F.2d 428, 434 (5th Cir. 1980), *cert. denied*, 450 U.S. 967 (1981); see *supra* note 4.

⁵⁸ See, e.g., *United States v. Harper*, 617 F.2d 35, 37 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980); *United States v. Tilton*, 534 F.2d 1363, 1366 (9th Cir. 1976); *United States v. Solmes*, 527 F.2d 1370, 1372 (9th Cir. 1975).

⁵⁹ See, e.g., *United States v. Green*, 671 F.2d 46, 53-54 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Streifel*, 665 F.2d 414, 422 (2d Cir. 1981); *United States v. Rivera*, 595 F.2d 1095, 1098 (5th Cir. 1979).

⁶⁰ See, e.g., *Blair v. United States*, 665 F.2d 500, 505 (4th Cir. 1981) (customs officers boarding vessel must have reasonable suspicion of law violation in absence of evidence indicating vessel crossed border); *United States v. D'Antignac*, 628 F.2d 428, 433 (5th Cir. 1980) (constitutionality of section 1581(a) boarding dependent on it being either a border search or an investigatory stop where customs officers had a reasonable suspicion of unlawful activity), *cert. denied*, 450 U.S. 967 (1981).

⁶¹ See 103 S. Ct. at 2577, 2582.

permits customs officers unlimited discretion to stop and board any vessel they choose, the Court may have overlooked the dangers of improper use of such authority as a device to circumvent the protections of the Constitution.⁶² Under the facade of a section 1581(a) documentation check, overzealous customs officers may board vessels indiscriminately with vague hopes of obtaining evidence of such serious violations as smuggling.⁶³ Never before has the Court permitted law enforcement officials such unlimited discretion to conduct "fishing expeditions."⁶⁴ Indeed, *Villamonte-Marquez* represents yet another extension of the recent trend of Burger Court decisions weakening the fourth amendment.⁶⁵ It is

⁶² See Note, *supra* note 46, at 741. A Coast Guard commander described the typical method of boarding vessels:

Warning shots usually stop them. Then we board, usually with five men in a smaller boat, well armed. We say we are operating under a law . . . It's a subterfuge. We say we are running a check for "compliance with U.S. law." Or we say: "We are authorized under umpty-umpty-ump of the government something," and we board.

If it's empty, we do a routine safety inspection, which is a warrantless search. There is the Fourth Amendment, which is designed to prevent unreasonable searches and seizures, and we have to be careful not to violate the guy's freedom.

Collier, *supra* note 44, at 7 (statement of Coast Guard Commander John Streeper).

⁶³ See *infra* note 65 and accompanying text. Given the size of most recreational vessels, once customs officers are on board, any stop can become a full scale search, since the officers can see everything on the deck, and often can view the interior through open hatchways. Comment, *supra* note 4, at 1039 n.49; see, e.g., *Villamonte-Marquez*, 103 S. Ct. at 2577 (marijuana spotted through open hatch); *United States v. Acosta*, 489 F. Supp. 61, 63 (S.D. Fla. 1980) (customs officer opening closed hatch and spotting marijuana); *cf. State v. Doyle*, 409 So. 2d 1168, 1169 n.2 (Fla. Dist. Ct. App. 1982) (sole intention of customs officer in stopping vessel was to search for contraband). In both *Acosta* and *Doyle*, the Government relied on the authority conferred by section 1581(a). See 489 F. Supp. at 64; 409 So. 2d at 1169.

⁶⁴ The discretion given to customs officers by section 1581(a) is similar to that given to inspectors of the various businesses that fall within the administrative search exception to the warrant requirement. See, e.g., Federal Mine Safety and Health Act of 1977, § 103(a), 30 U.S.C. § 813(a) (Supp. V 1981). The administrative search exception differs from the exception created by the Court in *Villamonte-Marquez* because it applies only to industries subject to pervasive government regulation. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (mining industry); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (liquor industry). The administrative search exception is justified by the diminished expectation of privacy that entrants into such industries have due to extensive government regulation. 1 W. RINGEL, *supra* note 1, § 14.3(b)(2), at 14-15. Professor LaFave has expressed concern that *Villamonte-Marquez* could set a dangerous precedent for similar unlimited conferrals of law enforcement authority. See LaFave, *supra* note 51, at 1746.

⁶⁵ See, e.g., *Scott v. United States*, 436 U.S. 128 (1978). In *Scott*, government agents had taped all conversations over one phone during a 1-month period. *Id.* at 130-31. Despite the fact that a statute required that wiretapping or surveillance be done in such a way as to

suggested that an exception to the warrant requirement that allows for the possibility of such searches without probable cause unnecessarily subverts the fourth amendment.

CONCLUSION

The fundamental constitutional rights secured by the fourth amendment should be afforded the utmost protection by the judiciary.⁶⁶ It is submitted that in *Villamonte-Marquez* the Court could have interpreted section 1581(a) in a manner more consistent with fourth amendment safeguards without unduly impeding the effectiveness of customs officers. As one member of the judiciary has noted, "[t]he shield against unreasonable searches does not

minimize the interception of "communications not otherwise subject to interception," 18 U.S.C. § 2518(5) (1982), the Supreme Court held that the agents' activity was not unreasonable. 436 U.S. at 143. Another decision of the Burger Court that weakened fourth amendment protections was *Rakas v. Illinois*, 439 U.S. 128 (1978), in which the Court held that the introduction of incriminating evidence obtained during an illegal search or seizure of a third party's property did not violate the defendant's fourth amendment rights, *id.* at 134. In the more recent case of *Illinois v. Gates*, 103 S. Ct. 2317 (1983), the Court addressed the meaning of probable cause with respect to a warrant issued based on information supplied by an anonymous informant and abandoned the *Aguilar-Spinelli* "two-pronged test." *Id.* at 2332. The test arose from two Supreme Court cases, *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). The first prong, "basis of knowledge," required a demonstration that the informant had a basis for his knowledge of the pertinent criminal conduct. 1 W. LAFAVE, *supra* note 42, § 3.3(a), at 501-02; see *Spinelli*, 393 U.S. at 416; *Aguilar*, 378 U.S. at 114. The second prong, "veracity," required the establishment of the informant's credibility. 1 W. LAFAVE, *supra* note 42, § 3.3(a), at 502. See *Aguilar*, 378 U.S. at 114. In place of the "two-pronged test," the *Gates* Court adopted a general "totality of the circumstances analysis" to determine the existence of probable cause. 103 S. Ct. at 2332.

It is suggested that this weakening of fourth amendment protections may be traced to several Justices' attitude toward the exclusionary rule. Chief Justice Burger and Justices White, Rehnquist, Blackmun, and Powell have expressed their unhappiness with the rule. McMillian, *Is There Anything Left of the Fourth Amendment?*, 24 St. Louis U.L.J. 1, 2-3 (1979); see, e.g., *Rakas*, 439 U.S. at 137 (Rehnquist, J.) (application of exclusionary rule exacts substantial cost). Not surprisingly, all five of these Justices were in the majority in *Villamonte-Marquez*. For a discussion of the Burger Court's treatment of recent fourth amendment cases, see LaFave, *supra* note 51, at 1740-48.

⁶⁶ See *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). In *Brinegar v. United States*, 338 U.S. 160 (1949), Justice Jackson, dissenting, noted that the rights secured by the fourth amendment

are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Id. at 180 (Jackson, J., dissenting).

rust on exposure to salt air”⁶⁷ By subjecting the fundamental rights of boaters to the unlimited discretion of customs officers, the Court has eviscerated the fourth amendment, not only as it applies in the maritime setting, but with respect to inland waters as well.⁶⁸

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⁶⁷ *United States v. Williams*, 617 F.2d 1063, 1095 (5th Cir. 1980) (Rubin, J., concurring).

⁶⁸ Although the *Villamonte-Marquez* decision refers to waters with access to the open sea, 103 S. Ct. at 2580, the language of the statute is broad enough to support the boarding of “any vessel or vehicle at any place in the United States or within the customs waters,” 19 U.S.C. § 1581(a) (1982) (emphasis added); see *supra* note 3 and accompanying text.